

No. M2018-\_\_\_\_\_

**IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE**

**SHELBY COUNTY BOARD OF EDUCATION, and  
METROPOLITAN BOARD OF PUBLIC EDUCATION,  
Plaintiffs-Appellees,**

**v.**

**WILLIAM HASLAM, in his official capacity as the  
GOVERNOR OF TENNESSEE, et al.,  
Defendants-Appellants.**

**ON APPLICATION FOR EXTRAORDINARY APPEAL FROM  
THE ORDER OF THE DAVIDSON COUNTY CHANCERY COURT**

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**DEFENDANTS' APPLICATION FOR  
EXTRAORDINARY APPEAL**

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## **QUESTIONS PRESENTED FOR REVIEW**

The Plaintiffs, local boards of education, have sued officials of the State of Tennessee, including the Governor and the Speakers of the Tennessee Senate and House of Representatives, generally alleging that Defendants have neglected their constitutional obligations in funding Tennessee's K-12 public schools. Specifically, Plaintiffs allege in Count 1 of their complaint that Defendants have underfunded Plaintiffs' school districts and, in doing so, have deprived their students of a constitutionally adequate education, in violation of article XI, section 12 of the Tennessee Constitution ("adequacy claim"). Plaintiffs allege in Count 2 of their complaint that Defendants' failure to provide adequate funding for public education has disproportionately harmed their students, in violation of article I, section 8 and article XI, section 8 of the Tennessee Constitution ("equity claim").

Defendants present two questions for this Court's immediate review:

- I. Whether Plaintiffs' adequacy claim (Count 1 of the complaint) is nonjusticiable under the political-question doctrine and is in any event barred by sovereign immunity.
- II. Whether Plaintiffs' equity claim (Count 2 of the complaint) fails to state a claim upon which relief can be granted.

## STATEMENT OF RELEVANT FACTS

The Tennessee General Assembly has established a statewide system of free public schools that is governed in accordance with state law and under the policies, standards, and guidelines of the State Board of Education. *See* Tenn. Code Ann. § 49-1-102(a). The statewide public-school system comprises the local school districts operated in each county or combination of counties. *See* Tenn. Code Ann. § 49-1-102(c).

To fund its public-education system, Tennessee uses a plan called the Basic Education Program (BEP). The BEP allocates funds to local school districts under a formula developed by the State Board of Education and enacted by the General Assembly. *See* Tenn. Code Ann. § 49-3-351(a).

Plaintiffs, the Shelby County Board of Education and the Metropolitan Board of Public Education, challenge the BEP funding formula. They filed suit in the Davidson County Chancery Court, and the gravamen of their complaint is that the General Assembly has neglected its constitutional obligation under the education clause of the Tennessee Constitution, article XI, section 12, which requires the General Assembly to “provide for the maintenance, support and eligibility standards of a system of free public schools.” (*See* Exhibit 1, Amended Complaint, ¶¶ 126, 138.) Plaintiffs purport to sue not only on behalf of themselves, but also on behalf of their districts, their teachers, and their students. (*Id.*, ¶¶ 1, 2.)

Plaintiffs have asserted an “adequacy” claim and an “equity” claim. (*Id.*, ¶ 138 (Count 1) and ¶ 144 (Count 2).) The adequacy claim challenges whether the General Assembly has appropriated enough money for

education. The equity claim challenges how state funds are distributed among local school districts.<sup>1</sup>

In support of the adequacy claim, Plaintiffs allege that the level of state funding is inadequate and thus violates the education clause. (*Id.*, ¶¶ 126-138.) They also allege that the BEP fails to account for the true cost of public education (*id.*, ¶ 129) and that additional funding is needed for nearly every aspect of the educational process, including staffing, professional development, community engagement, social services, facilities, classroom costs, school programs, transportation, and student safety (*id.*, ¶¶ 38-104). As relief for this claim, Plaintiffs seek a declaratory judgment that the General Assembly does not meet its constitutional duty to provide sufficient funds for Tennessee’s public schools. (*Id.* at 42.) They also request a “permanent injunction requiring the Legislature to appropriate sufficient amounts of money to fund the school funding formula, as amended pursuant to this Court’s order, to the level required by the Tennessee Constitution.” (*Id.* at 43.)

In support of the equity claim, Plaintiffs allege that the distribution of state funds among local school districts is inequitable and thus violates the equal-protection provisions of the Tennessee Constitution, article I, section 8, and article XI, section 8. (*Id.*, ¶¶ 139-144.) Plaintiffs do not specify how state funds should be distributed among districts, but

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<sup>1</sup> Plaintiffs raise four additional claims. (Exhibit 1, Amended Complaint, ¶¶ 145-174.) Those claims challenge the validity of imposing certain school fees (Counts 3 and 4), allege a statutory violation in BEP funding (Count 5), and allege an unfunded mandate (Count 6). These claims, however, are not relevant to the questions presented for review by this application. *See infra* note 4.



presumably they seek a greater share of the available state funds. They claim entitlement to greater funding based on allegations that the BEP does not account for the higher costs of educating students in their districts. (*Id.*, ¶ 140.) Plaintiffs allege that they have “more high-cost children” than other local school districts and that, therefore, they are disproportionately harmed by an overall lack of adequate funding. (*Id.*, ¶¶ 140, 142.) They assert that their students are receiving “a worse education than their peers in other districts.” (*Id.*, ¶ 143.)

Defendants moved to dismiss Plaintiffs’ complaint under Tenn. R. Civ. P. 12.02(1) and (6). (Exhibit 2, Defendants’ Motion to Dismiss, 1.) They argued that Plaintiffs’ adequacy claim raises a nonjusticiable political question under all the justiciability factors in *Baker v. Carr*, 369 U.S. 186 (1962). (Exhibit 3, Defendants’ Memorandum of Law for Motion to Dismiss, 8.) Defendants also argued that the adequacy claim is barred by the doctrine of sovereign immunity because it seeks to reach the State’s treasury. (*Id.* at 31-32.) Defendants argued that Plaintiffs’ equity claim fails to state a claim upon which relief can be granted because it requests relief that is contrary to the Tennessee Constitution and the Tennessee Supreme Court’s holding in *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151, 156 (Tenn. 1993).<sup>2</sup> (*Id.* at 33-36.)

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<sup>2</sup> Defendants also argued that Plaintiffs lack constitutional standing to raise any of their claims for relief and that Defendants Beth Harwell and Randy McNally have legislative immunity under the speech and debate clause, Tenn. Const. art. II, § 13. (Exhibit 2, Defendants’ Motion to Dismiss, 1.)

The trial court denied Defendants’ motion to dismiss. (Exhibit 4, Order Denying Defendants’ Motion to Dismiss, 2.) The court concluded that Plaintiffs’ adequacy claim is justiciable under the factors set forth in *Baker v. Carr*, and under the rulings in the *Small Schools* trilogy,<sup>3</sup> which, the court said, addressed a “very similar” claim. (*Id.* at 6-7.) The trial court also determined that the adequacy claim is not barred by sovereign immunity because Plaintiffs seek only declaratory and injunctive relief, and not money damages. (*Id.* at 7.) Lastly, the trial court concluded that Plaintiffs sufficiently pled an equity claim, stating that “[e]quity claims are probably the last claims to be dismissed in chancery at the pleading stage, due to their fact-intensive nature.” (*Id.* at 8.)

Defendants then moved for permission to appeal the trial court’s order under Tenn. R. App. P. 9, arguing that immediate review is warranted for four reasons. (Exhibit 5, Defendants’ Motion for Permission to Appeal, 2.) First, there is a need to prevent irreparable injury because allowing this case to proceed to trial would undermine the political-question doctrine and sovereign immunity. (Exhibit 6, Memorandum of Law in Support of Motion for Permission to Appeal, 3.) Second, interlocutory review would prevent needless, expensive, and protracted litigation, as reversal of the trial court’s order would significantly reduce the duration and expense of this litigation. (*Id.*)

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<sup>3</sup> The *Small Schools* trilogy comprises *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (“*Small Schools I*”); *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734 (Tenn. 1995) (“*Small Schools II*”); and *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) (“*Small Schools III*”).

Third, because the justiciability of Plaintiffs’ adequacy claim presents a legal issue of first impression in Tennessee, there is a need to develop a uniform body of law. (*Id.*) Fourth, the appeal is limited to questions of constitutional law—all of which address matters of great public importance. (*Id.*)

The trial court denied the motion for permission to appeal. (Exhibit 7, Order Denying Motion for Permission to Appeal.) The court determined that “at this stage of the litigation, there is an insufficient record from which an appellate court could review the legal issues presented,” because “[t]he Amended Complaint is sprawling in nature, and it contains many allegations regarding the problems and needs of public schools.” (*Id.* at 5.) The trial court also determined that immediate review was not warranted because “there is a very high bar for dismissal and a very heavy burden for a party that seeks dismissal of a pleading under Tennessee Rule of Civil Procedure 12.02.” (*Id.*) Regarding the justiciability of the adequacy claim, the court stated that “there was no bright line between adequacy claims and equal protection claims” and that *Small Schools I* had involved both adequacy and the equitable distribution of funding. (*Id.* at 5, 6.) While the trial court “recognize[d] the importance of this case,” it concluded that “[t]here is no irreparable harm that would justify granting permission to appeal.” (*Id.* at 6.)

Defendants now apply directly to this Court under Tenn. R. App. P. 10 for an extraordinary appeal of the trial court’s order denying Defendants’ motion to dismiss.

## REASONS SUPPORTING AN EXTRAORDINARY APPEAL

This Court has discretion under Rule 10 to accept an extraordinary appeal from an interlocutory order of a trial court. An extraordinary appeal is warranted “(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules.” Tenn. R. App. P. 10(a). The Tennessee Supreme Court has stated that “a Rule 10 extraordinary appeal will lie whenever the prerequisites for common law certiorari exist,” and such a prerequisite exists when “either party has lost a right or interest that may never be recaptured.” *State v. McKim*, 215 S.W.3d 781, 791 (Tenn. 2007) (citing *State v. Willoughby*, 594 S.W.2d 388, 392 (Tenn. 1980)).

An extraordinary appeal is needed here. Allowing this case to proceed in the trial court on Plaintiffs’ adequacy claim would violate the political-question doctrine and the doctrine of sovereign immunity, and thus deprive Defendants of constitutional interests and protections that they could not recapture. Further, allowing this case to proceed on Plaintiffs’ equity claim would run afoul of the Tennessee Constitution and controlling Tennessee Supreme Court precedent.<sup>4</sup> The questions

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<sup>4</sup> Plaintiffs four remaining claims (Counts 3 to 6 of the complaint) present discrete issues that do not implicate the constitutional validity of the State’s entire education-funding scheme, and they will not require the level of scrutiny of legislative and administrative decision-making that Plaintiffs’ adequacy claim and equity claim will demand. Accordingly, Defendants do not seek this Court’s immediate review of the trial court’s order insofar as the court denied dismissal of Counts 3 to 6.

presented involve matters of great public importance and require this Court's immediate review.

**I. Proceeding on Plaintiffs' Adequacy Claim Would Violate the Political-Question Doctrine.**

Plaintiffs' adequacy claim is not justiciable under the political-question doctrine, which works to preserve the separation of powers mandated by the Tennessee Constitution. *See* Tenn. Const. art. II, § 2; *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 202-03 (Tenn. 2009). The political-question doctrine ensures that only questions appropriate for judicial review will be decided by the judiciary. *See Bredesen v. Tennessee Judicial Selection Comm'n*, 214 S.W.3d 419, 434-35 (Tenn. 2007). If a claim presents a court with a political question that a coordinate branch of government has exclusive authority to decide, the claim is nonjusticiable, and the court should abstain from deciding it. *See generally Baker v. Carr*, 369 U.S. 186, 210 (1962).

Under the Tennessee Constitution, the Tennessee General Assembly has exclusive authority to make decisions regarding the provision of public education and the appropriation of state funds. *See* Tenn. Const. art. XI, § 12 ("The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools."); Tenn. Const. art. II, § 24 (making the "Legislative Department" responsible for "Appropriation of public moneys"); *see also S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001) (stating that the legislature has "plenary and exclusive authority" to provide for a public-school system); *State v. Thomason*, 221

S.W. 491, 494 (Tenn. 1920) (stating that the legislature has “exclusive control of the expenditure of the public moneys”).

This grant of exclusive authority to the legislature means that the judiciary may not make determinations regarding the proper level of funding for K-12 public education, much less order appropriation for same. But that is exactly what Plaintiffs are asking the Davidson County Chancery Court to do. On the basis of their adequacy claim, they want the trial court to find that the current level of education funding is inadequate. (Exhibit 1, Amended Complaint, 42.) Moreover, they want the trial court to require the legislature to increase its appropriation for education to which end they have expressly sought an order enjoining the “Legislature to appropriate sufficient amounts of money to fund the school funding formula, as amended pursuant to this Court’s order, to the level required by the Tennessee Constitution.” (*Id.* at 43.)

The trial court could not grant these requests without overriding the legislature’s policy decisions about the level of funding that is needed for Tennessee’s public schools. Because those decisions belong exclusively to the legislature, Plaintiffs’ adequacy claim presents a nonjusticiable political question that the trial court should not be permitted to decide. *See Ballentine v. Pulaski*, 83 Tenn. 633, 640 (1885) (recognizing that the extent to which government provides for education is an issue of public policy, “and addresses itself to the Legislature and the people, not to the courts”); *see also Small Schools III*, 91 S.W.3d at 242-43 (“It is not the business of the courts to decide how salaries are funded or at what level teachers should be compensated, for it is the

legislature who ‘speaks for the people on matters of public policy’ such as these.”).<sup>5</sup>

To avoid any unconstitutional exercise of judicial authority, this Court must intervene to review the justiciability of Plaintiffs’ adequacy claim before the claim proceeds any further. Having denied Defendants’ motion to dismiss, however, the trial court is poised to do what the political-question doctrine forbids. Absent this Court’s immediate review, the trial court will proceed to address the merits of a nonjusticiable claim, in violation of the political-question doctrine and thus the separation of powers. And it matters not how the trial court rules on the claim; even if it were to find that the legislature’s funding of public education is adequate, the damage will have been done, because only the legislature has constitutional authority to make such policy determinations. *Thomason*, 221 S.W. at 494.

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<sup>5</sup> Numerous other States have dismissed similar adequacy claims on justiciability grounds. *See, e.g., Campaign for Quality Educ. v. State*, 209 Cal. Rptr.3d 888, 894-95 (Cal. Ct. App. 2016) (concluding that the two education provisions of California’s Constitution “do not provide for an education of ‘some quality’ that may be judicially enforced”), *review denied* (Cal. Aug. 22, 2016); *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009) (recognizing that the Indiana Constitution “does not mandate any judicially enforceable standard of quality”); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 179 (Neb. 2007) (“[T]here are no qualitative, constitutional standards for public schools that this court could enforce, apart from the requirements that the education in public schools must be free and available to all children.”); *Okla. Educ. Ass’n v. State*, 158 P.3d 1058, 1066 (Okla. 2007) (“[W]e are constitutionally prohibited from [interfering with] the Legislature’s domain of making fiscal policy decisions and of setting education policy[.]”).

## **II. Proceeding on Plaintiffs’ Adequacy Claim Would Violate Sovereign Immunity.**

Plaintiffs’ adequacy claim is also barred by sovereign immunity. Under this doctrine, the State may be sued and subjected to liability only as directed by the legislature. *See* Tenn. Const. art. I, § 17; *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 848-849 (Tenn. 2008). Sovereign immunity is not just immunity from liability, it is immunity from suit. It thus protects the State and State officials from the burden of defending against such suits. As the legislature has expressly specified, no court in Tennessee has “any power, jurisdiction or authority to entertain any *suit* against the state” that seeks to reach the State’s treasury and “all such *suits* shall be dismissed as to the state . . . on motion.” Tenn. Code Ann. § 20-13-102(a) (emphasis added).

Plaintiffs’ adequacy claim seeks to reach the State’s treasury, because it seeks an order that would require the legislature to increase funding for public education. (Exhibit 1, Amended Complaint, 43.) The State is clearly immune from suit on that claim and, by not granting Defendants’ motion to dismiss, the trial court has so far departed from the required course of proceedings as to necessitate immediate appellate review. If the adequacy claim were allowed to proceed to trial, Defendants would be denied the full protection of their sovereign immunity—immunity from the burden of defending against a suit—and, if forced to stand trial, would lose a right that they could never recapture.

Sovereign immunity is comparable to the qualified immunity afforded to government officials. *See King v. Betts*, 354 S.W.3d 691, 703-05 (Tenn. 2011). And the Tennessee Supreme Court has explained that



questions regarding qualified immunity should be resolved as soon as possible:

Qualified immunity is more than simply a defense to liability. . . . Qualified immunity entitles a defendant not to stand trial. Thus, the purposes of qualified immunity are effectively undermined if a claim against a government official or employee is erroneously permitted to go to trial.

*Id.* (internal citations and quotations omitted).<sup>6</sup>

This same rationale applies here. The purposes of sovereign immunity are likewise effectively undermined if a claim seeking to reach the State treasury is erroneously permitted to go to trial. Accordingly, to avoid that circumstance, this sovereign-immunity issue should also be immediately reviewed by this Court. Otherwise, the State will lose an interest that will never be recaptured.

### **III. Proceeding on Plaintiffs' Equity Claim Would Run Afoul of the Tennessee Constitution and Controlling Precedent.**

Plaintiffs' equity claim patently fails to state a claim on which relief can be granted. While Plaintiffs allege that the distribution of state funds for public education violates the equal-protection provisions in the Tennessee Constitution, they do not ground their claim in equal-protection principles. Plaintiffs do not contend that their school districts are being treated differently or unequally by the BEP's distribution of funds, as compared to other districts. *See Doe v. Norris*, 751 S.W.2d 834,

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<sup>6</sup> Similarly, when addressing legislative immunity under the federal Constitution, the United States Supreme Court has stated that legislative immunity protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

841 (Tenn. 1988) (“The concept of equal protection espoused by the federal and our state constitutions guarantees that ‘all persons similarly circumstanced shall be treated alike.’”). Rather, Plaintiffs base their equity claim on a purported *lack* of differential treatment. They complain that the BEP does not account for the comparatively higher costs of educating students in their districts and that, as a result, their students are disproportionately harmed by an overall lack of adequate funding. (Exhibit 1, Amended Complaint, ¶¶ 140-43.) While Plaintiffs do not specify how state funds should be distributed among districts, they are necessarily seeking relief that would give them a greater share of the available state funds, so as to eliminate the alleged “disproportionate effect” of the current funding scheme. (*Id.*, ¶ 140.)

This is not a cognizable equal-protection claim. *Equal* protection does not guarantee *differential* treatment under the law, so a lack of differential treatment cannot serve as the basis for an equal-protection claim. Plaintiffs’ equity claim, therefore, should have been dismissed, regardless of the “very high bar for dismissal” on which the trial court relied. (Exhibit 7, Order Denying Motion for Permission to Appeal, 5.)

The Tennessee Supreme Court’s decision in *Small Schools I* makes this clear. *Small Schools I* addressed the issue of disparate funding levels among Tennessee’s school districts. At the time of that decision, the amount of funding per-pupil was generally lower in rural areas as compared to urban areas. *Small Schools I*, 851 S.W.2d at 143. In some instances, students in certain districts were receiving twice as much funding as others. *See id.* The Supreme Court found that there were significant disparities in funding among the various school districts and

that, consequently, students across Tennessee were not receiving the same educational opportunities. *See id.* at 154-56. The Court held that this violated the equal-protection provisions of the Tennessee Constitution. The Court deferred to the General Assembly on how to correct the constitutional violation, but it was apparent that the General Assembly would need to significantly reduce the disparities in funding among Tennessee’s school districts. The General Assembly did this by enacting the BEP, which considers the fiscal capacity of local school districts and limits disparities in funding. *See generally* Tenn. Code Ann. §§ 49-3-307(a)(10); 49-3-356.

Plaintiffs’ equity claim runs afoul of *Small Schools I*. The relief Plaintiffs seek, if granted, would regenerate the cycle of funding disparities that the Supreme Court found unconstitutional in *Small Schools I*, as Plaintiffs have asked for comparatively *more* funding because they have “more high-cost children” with “increased needs.” (Amended Complaint, ¶ 140.)

The trial court, though, denied Defendants’ motion to dismiss this claim. Because that ruling departs from fundamental equal-protection principles, this Court’s immediate review of Plaintiffs’ equity claim is also warranted.

## **CONCLUSION AND RELIEF SOUGHT**

For these reasons, the application for extraordinary appeal should be granted. The order of the trial court denying Defendants' motion to dismiss Counts 1 and 2 of the complaint should be reversed.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of November, 2018, a true and exact copy of the foregoing was served via the court's electronic filing system and forwarded via first class, postage prepaid mail to:

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